

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2004-0324, Tia Bastian v. Wellingwood Estates Condominium Association, the court on September 8, 2005, issued the following order:

The defendant, Wellingwood Estates Condominium Association, appeals an order of the Nashua District Court awarding damages and attorney's fees to the plaintiff, Tia Bastian. We affirm in part and reverse in part.

The plaintiff owns two condominium units in Wellingwood Estates. She challenged several late fees assessed against her, and argued that the defendant had also overcharged her for a special assessment. The trial court awarded her damages equal to the late fees and the excess special assessment, plus attorney's fees. The court ordered that the individual members of the defendant's board of directors be responsible for payment of the attorney's fees, and that the defendant be prohibited from assessing its members for the cost of its own attorney's fees.

On appeal, the defendant first argues, and the plaintiff does not seriously contest, that the trial court erred in ruling that the defendant failed to authorize an initial special assessment in the total amount of \$7,000. We agree. It is also undisputed, however, that the defendant thereafter charged and collected \$14,000 from the unit owners rather than \$7,000. The trial court found that the defendant did not properly approve a further special assessment or retention of the overcharged amount. We will not disturb the trial court's findings unless they are unsupported by the evidence or erroneous as a matter of law. Fiumara v. Robinson, 144 N.H. 78, 81 (1999). The defendant contends that its board of directors approved the retention of the additional \$7,000 at its meeting on May 1, 2003. The minutes of the May 1, 2003 meeting do not indicate any vote by the defendant's board to approve the additional \$7,000, and one of the board members present at that meeting testified that no vote was taken by the board to approve it. Thus, while there may have been evidence to the contrary, the record contains sufficient evidence to support the trial court's finding.

The defendant argues that a resolution dated April 15, 2004, "ratified" the collection and expenditure of the additional \$7,000. This resolution is dated after the trial in this case, which took place on March 5, 2004, and the defendant admits that its validity was not an issue before the trial court. We therefore will not consider the validity or effect of the April 15, 2004 resolution.

With respect to the late fees, the defendant argues that the plaintiff was in default as of March 1, 2003, when she did not pay the first installment of the special assessment. As the plaintiff notes in her brief, this argument is belied by

the defendant's own account, which plainly shows that the first installment was timely paid. To the extent that the defendant seeks to justify the late fees upon the plaintiff's alleged failure to timely pay the second installment of the special assessment, that "installment" was in actuality the overcharge that the defendant mistakenly collected. Having upheld the trial court's finding that the overcharge was not authorized, it follows that no late charge could have been properly assessed for any failure to timely pay it.

The defendant next challenges the award of attorney's fees. The trial court ruled that the defendant's defense had no reasonable basis in the facts. See Glick v. Naess, 143 N.H. 172, 175 (1998). In reviewing an award of attorney's fees, we give tremendous deference to the trial court's decision – if there is some support in the record for the trial court's determination, we will uphold it. Id.

As the plaintiff points out, the record before us indicates that the defendant made arguments that are contradicted by its own documentation. Testimony that the defendant's management company was unaware on March 11, 2003, that the plaintiff was purchasing unit 48 was contradicted by evidence that the witness had mailed a letter on March 4 identifying the plaintiff as the purchaser. As noted above, the defendant argued that late fees resulted from a failure to make a payment by March 1, 2003, that the defendant's own account showed had in fact been paid. We will uphold an award of attorney's fees when a party must litigate against an opponent whose position is patently unreasonable. Id. Given the "tremendous deference" we must afford the trial court's decision, we conclude that there is some support in the record for it. Id.

We agree with the defendant, however, that the trial court erred by ordering the individual directors of the defendant's board, who are not parties to this action, to individually pay the plaintiff's attorney's fees. We also agree that the court erred in sua sponte prohibiting the defendant from assessing its members in order to pay its own legal fees. Accordingly, we reverse that portion of the trial court's order.

The plaintiff requests an award of attorney's fees and costs for this appeal. We are not prepared, particularly given that we are reversing the trial court's order in part, to rule that this appeal was frivolous or in bad faith. We therefore decline the plaintiff's request for attorney's fees. See Sup. Ct. R. 23. We further conclude, however, that under the circumstances of this case, justice requires that no costs be awarded to either party. Accordingly, we order that each party shall bear its own costs on appeal, and that no costs shall be awarded to either party pursuant to Rule 23.

Finally, we note that in its brief, the defendant argues that if we do not rule in its favor on all issues on appeal, we should remand to the trial court because the transcript of the hearing was incomplete. After the transcript was filed with this court, the defendant filed a motion to supplement the record, notifying the court that the testimony of Gayle Llewellyn and a portion of the testimony of Cal Davison was missing. The defendant did not request that the matter be

remanded to the trial court either to attempt to reconstruct the record or for a new trial. Instead, the defendant sought to supplement the record on appeal with an affidavit of Gayle Llewellyn that contained statements consistent with her trial testimony. We granted that motion. The defendant did not file a motion to add a question to its notice of appeal regarding the incomplete transcript. See Sup. Ct. R. 16(3)(b). Having granted the relief requested by the defendant after it learned of the incomplete transcript, and absent any request by the defendant to add a question on appeal seeking any further relief, we decline the defendant's request to remand this case for further proceedings.

Affirmed in part and reversed in part.

NADEAU, DUGGAN and GALWAY, JJ., concurred.

**Eileen Fox,
Clerk**